IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.128 OF 2005

Kondiba Dhondiba Toke ...Appellant

Vs.

Ganpati Pandurang Khairmode
(since deceased through heirs) ...Respondents

Mr.N.J.Patil for the Appellant

CORAM: A.S.OKA, J.
DATED: APRIL 6,2005.

P.C.:

1. The Second Appeal is by the original Defendant No.2. The decree for partition has been passed in favour of the original Plaintiffs. The Appellant-Defendant No.2 claims on the basis of the sale deed executed by original Defendant No.1 in his favour. The finding recorded by both the Courts below is that the Appellant has not acquired exclusive title over the suit property at Serial Nos.1 to 3. The case of the original Defendant No.1 was that there was earlier partition. The said case has been disbelieved by the Courts below. The Trial Court has recorded a finding that the original Defendant No.1 was not having exclusive title to the suit property and the same could not have been transferred by him in favour of the Appellant.

2. The Appellate Court also dealt with the said contentions. The Appellate Court held that the Appellant-Defendant No.2 has failed to prove that the property acquired by the Appellant from the original Defendant No.1 was required to be

sold by the original Defendant No.1 for legal necessity.

3. After having heard the learned Counsel for the Appellant, I find that there is no error in the findings of fact recorded by the Courts below. The burden of establishing that the sale transaction was for legal necessity was on the Appellant and he has failed to discharge the said burden. The original Defendant No.1 could not lead satisfactory evidence to establish his plea of prior partition. I, therefore, find no error in the decree passed by the Trial Court which was partly modified by the Appellate Court.

4. The learned Counsel for the Appellant submitted that the Appellate Court has held that deceased Defendant no.1 is entitled to 7/24 share in the property described in paragraph 1(1) and 1(2) of the plaint. Therefore a direction may be given that the property which is sold to the Appellant be allotted to the share of deceased Defendant No.1. The Appellate Court has passed a preliminary decree and has directed that the Court Commissioner shall be appointed in final decree proceedings for suggesting the partition of the properties 1(1) and 1(2) keeping in mind the provisions of Partition Act,1893. In view of this direction it is for the Appellant to raise appropriate contentions in the final decree proceedings.

5. Subject to observations made above, Second Appeal is dismissed with no order as to costs.

Judge.